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In the Supreme Court of the United States

OCTOBER TERM, 1985

IRVING AND CHARLOTTE RADOL, ET AL., PETITIONERS

v.

W. BRUCE THOMAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioners brought this class action on behalf of themselves and other former shareholders of Marathon Oil Company (Marathon) against respondents United States Steel Corporation (USS), members of the USS board of directors, and former Marathon directors, alleging violations of the federal securities laws, common law fraud, and breach of fiduciary duty (Pet. App. A-2). This misconduct allegedly

occurred in connection with USS's negotiated acquisition of Marathon pursuant to a friendly cash tender offer commencing in November 1981 for 51% of Marathon's outstanding shares, followed by a March 1982 "freeze-out" merger in which USS acquired the remaining 49% of the Marathon stock in exchange for USS debentures (*ibid.*).

After the district court granted partial summary judgment in favor of respondents,[1] the sole federal securities law claim that remained for trial was petitioners' allegation that respondents had violated general antifraud provisions, Sections 10(b) and 14(e), of the Securities Exchange Act, 15 U.S.C. 78j(b) and 78n(e), and 17 C.F.R. 240.10b-5, by failing to disclose at the time of the tender offer two reports containing valuations of Marathon's assets, the bulk of which were oil and gas reserves (Pet. App. A10-A12, A49-A64). According to petitioners, the omission rendered misleading the tender offer materials disseminated by USS and Marathon to Marathon shareholders in November 1981 (*id.* at A60-A61). Marathon had commissioned the two reports in mid-1981, anticipating that a hostile takeover attempt might be precipitated by the declining market price of its stock (*id.* at A3-A4). The two reports, known, respectively, as the "Strong" and "First Boston" reports, indicated per-share net asset values substan-

[1] The district court rejected, among others, petitioners' contentions that the two-tier acquisition was an unlawful coercive and manipulative device (Pet. App. A53-A56), that respondents' communications at the time of the tender offer amounted to unlawful proxy solicitation (*id.* at A56-A58), and that SEC disclosure requirements applicable to the freeze-out merger applied to the earlier tender offer as well (*id.* at A58-A60). The petition for a writ of certiorari does not present any of these claims.

tially in excess of the current market price of Marathon stock (*id.* at A4). Marathon provided the reports to USS in the course of preliminary merger negotiations, but neither Marathon nor USS revealed the reports to the shareholders during the almost two-month period of the tender offer (*id.* at A6, A8-A9).[2]

The district court found that the two "reports were not prepared in the ordinary course of business. Instead, they were intended to be 'selling documents' for use in attracting more favorable tender offers [than the anticipated hostile bid]" (Pet. App. A50). According to the district court, the calculations used in the two reports "were based on speculation and assumptions which included economic predictions as far as 50 years into the future and projections of the future price of oil" (*ibid.*). The district court nonetheless denied respondents' motion for summary judgment with respect to the lawfulness of respondents' failure to disclose the asset appraisals, holding that the appraisals were not immaterial as a matter of law (*id.* at A62). The court stated that it was "conceivable that a 'reasonable shareholder' would have accorded the valuations 'actual significance' in his deliberations, even if disclosure would not have altered his decision" (*ibid.*, quoting *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438, 449 (1976)).

At the conclusion of a four-week trial, the court instructed the jury on, among other issues, the questions of materiality and respondents' duty to disclose

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[2] The reports were subsequently disclosed in the proxy statement issued in February 1982 in connection with the freeze-out merger, as required by the Securities and Exchange Commission. 17 C.F.R. 240.13e-3, 240.13e-100, Item 9. See Pet. App. A9-A10.

the two reports. These instructions included the following:

> Representations concerning future sales, projections, forecasts, and the like, only rise to the level of materiality when they can be calculated with [Tr. 2648] substantial certainty.
>
> Only disclosure of existing, material facts is required. Economic forecasts are not.
>
> A failure to make known a projection of future earnings is not a violation of the Federal Securities Law.
>
> * * * * *
>
> An omitted fact is material if there is a substantial likelihood that a-reasonable person would consider it important in deciding whether to tender his stock.

Br. in Opp. App. 37a. The jury returned a verdict for respondents on the federal securities law claim (and on a state law breach of fiduciary duty claim) (Pet. App. A10-A12).

2. The court of appeals affirmed (Pet. App. A1-A27). The court held (*id.* at A15) that the district court's instructions accurately stated the general test for materiality set forth in *Northway* and the Sixth Circuit precedent governing the duty to disclose asset appraisals. The court added that the lower court erred in allowing the question to go to the jury at all when it was merely "conceivable" that a reasonable shareholder would have found the reports significant.

The court relied heavily on its reasoning in the companion case *Starkman* v. *Marathon Oil Co.*, 772 F.2d 231 (6th Cir. 1985), cert. denied, No. 85-1029 (Feb. 25, 1986), decided the same day and also arising out of USS's acquisition of Marathon. *Starkman*

involved respondents' duty to disclose the Strong and First Boston reports during the period prior to USS's tender offer (Pet. App. A28-A29).[3] In *Starkman*, the court of appeals concluded (*id.* at A14-A16, A37-A47) that the two reports were not sufficiently reliable to meet the materiality standard this Court adopted in *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. at 449,[4] as subsequently applied in Sixth

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[3] *Starkman* was a suit by a Marathon shareholder who had sold his shares in the open market before the commencement of the USS tender offer in November 1981 (Pet. App. A28-A29). (The plaintiff class in the present case is comprised of Marathon shareholders who tendered and shareholders who did not tender and were taken out in the subsequent merger.) In *Starkman*, the primary federal securities law claim concerned Marathon's obligation to disclose the two reports and five-year earnings and cash-flow projections in connection with an unsuccessful tender offer by Mobil Oil Company in October 1981 (Pet. App. A29). The court of appeals affirmed the district court's grant of summary judgment, reasoning that the net asset values detailed in the reports, as well as the earnings projections, were consistent with Marathon's statements to shareholders that Mobil's bid was "grossly inadequate" (*id.* at A36-A47). This Court recently denied certiorari in *Starkman* on questions relating primarily to the materiality of preliminary merger negotiations between Marathon and USS. *Starkman* v. *Marathon Oil Co.*, cert. denied, No. 85-1029 (Feb. 25, 1986).

[4] Although this Court in *Northway* defined materiality in the context of an alleged violation of 17 C.F.R. 240.14a-9 governing proxy disclosures (426 U.S. at 448-449), the lower courts have adopted the same definition in cases arising under both Sections 10(b) and 14(e) of the Securities Exchange Act. See, *e.g.*, *Flynn* v. *Bass Brothers Enterprises, Inc.*, 744 F.2d 978, 985 (3d Cir. 1984); *Staffin* v. *Greenberg*, 672 F.2d 1196, 1205 n.10 (3d Cir. 1982); *Panter* v. *Marshall Field & Co.*, 646 F.2d 271, 289 (7th Cir.), cert. denied, 454 U.S. 1092 (1981); *Seaboard World Airlines, Inc.* v. *Tiger Int'l, Inc.*, 600 F.2d 355, 358 n.3, 360-361 (2d Cir. 1979).

Circuit cases dealing with "soft information," [5] a test that the court interpreted as requiring disclosure of "asset appraisals based upon predictions regarding future economic and corporate events only if the predictions * * * are substantially certain to hold" (Pet. App. A45).

In *Starkman*, the court of appeals also examined at length the history of SEC disclosure rules concerning soft information. The court noted that, by the time USS made its offer in November 1981, the Commission's general disclosure policy had evolved from *prohibiting* disclosure of asset appraisals, projections, and other soft information to *permitting*, but not mandating, such disclosure if the supporting assumptions and hypotheses were revealed (Pet. App. A41-A42). The court emphasized (*id.* at A42-A43), however, that at the time of the USS tender offer, Commission Regulation S-K (17 C.F.R. Pt. 229) *prohibited* disclosure of estimates of less-than-proven oil and gas reserves (see pages 11-12, *infra*). While noting that the Commission later modified its regulations

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[5] "Soft information" is a term used to refer to a variety of "statements concerning the future, such as projections, forecasts, predictions, and statements concerning plans and expectations * * * [and] information based primarily on subjective evaluations—for example, representations concerning * * * the appraised value of assets * * *." Schneider, *Nits, Grits, and Soft Information in SEC Filings*, 121 U. Pa. L. Rev. 254, 255 (1972). Accord, L. Loss, *Fundamentals of Securities Regulation* 163-165 (1983) (promises, predictions, estimates, projections, or forecasts); *Guides for Disclosure of Projections of Future Economic Performance*, SA Rel. No. 5992 (Nov. 7, 1978); 43 Fed. Reg. 53246, 53247 n.13 (1978) (management projections of future earnings, sales and net income, planned capital expenditures and financing, corporate business plans and objectives, and statements of dividend policies and capital structure policies).

to permit (but not require) the inclusion of unproven reserve estimates in a target's Commission filings where, as here, the information is provided to the bidder (see pages 12-13, *infra*), the court was "reluctant to impose liability on Marathon for failing to disclose asset appraisals based on hypothetical valuations which the SEC did not then permit to be disclosed in most contexts" (Pet. App. A43). In this regard, the court observed that Section 23(a)(1) of the Securities Exchange Act, 15 U.S.C. 78w(a)(1), precludes the imposition of liability for " 'any act done or omitted in good faith in conformity with a rule, regulation, or order of the Commission' " (Pet. App. A43 (citation omitted)).

The court of appeals then considered whether there existed any "compelling authority" that would overcome the specific Commission prohibition (Pet. App. A43, A44-A46). The court concluded that its precedents not only failed to provide "compelling authority" to require disclosure of the reports, but affirmatively supported nondisclosure of asset appraisals based on predictions not "substantially certain to hold" (*id.* at A45; see *id.* at A14). The court contrasted its approach of examining the reliability of projections underlying asset appraisals with the approach formulated by the Third Circuit in *Flynn* v. *Bass Brothers Enterprises, Inc.*, 744 F.2d 978 (1984) (a case not involving appraisals of oil and gas reserves), under which a district court is directed to weigh the benefits of disclosure against the harm in light of the "totality of the circumstances" in each case (Pet. App. A45-A46).[6]

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[6] Elsewhere in *Starkman*, the court of appeals articulated a different and potentially more stringent version of its materiality standard. See Pet. App. A44 ("soft information such

Applying its test to the predictions underlying the valuations in the Strong and First Boston reports, the court of appeals concluded that these reports were not required to be disclosed in connection with the USS tender offer (Pet. App. A14-A15; see also *id.* at A46).[7] The court stressed in *Starkman* that the estimates contained in the two reports were "based on highly speculative assumptions regarding the path of oil and gas prices, recovery rates and the like over a period of thirty to fifty years" (Pet. App. A46). Absent "an accompanying mountain of data and explanations," the court concluded, "[d]isclosure of such estimated values could well have been misleading" (*ibid.*).

DISCUSSION

The question under what circumstances the antifraud provisions of the federal securities laws may require the disclosure of "soft information" (such as asset appraisals based on projections) is an important one, and the Sixth Circuit's approach to that question in the present case differs, at least in emphasis, from the Third Circuit's approach in *Flynn*. The present case, however, turns in large part on a specific provision, since amended, of Commission regulations governing disclosures relating to oil and gas assets, and the decision below reflects the lower court's view of the particular appraisals at issue.

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as asset appraisals and projections must be disclosed only if the reported values are virtually as certain as hard facts").

[7] The court did not distinguish between the materiality of the information and the duty to disclose it. Only the materiality issue is raised by the petition (see Pet. i). All the parties agree that the disclosure of summaries of the reports was required (and occurred) after the tender offer, in connection with the freeze-out merger. See note 2, *supra*.

Other cases, including future cases in the Sixth and Third Circuits and two cases now pending in other circuits, may present broader, yet more sharply focussed, questions concerning the obligation to disclose soft information. Accordingly, we suggest that the Court deny certiorari here and await a case of more general significance in which to consider such questions.

1. Any liability for nondisclosure of the Strong and First Boston reports would depend on the effect of since-amended Commission regulations applicable only to the oil and gas industry. As the court of appeals observed (see page 6, *supra*), the Commission's policy concerning disclosure of soft information has evolved over the past 15 years. By the time of the USS tender offer, the Commission had shifted from discouraging the inclusion in Commission filings of appraised asset valuations and other future-oriented data [8] to encouraging public disclosure of

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[8] Traditionally, the Commission had viewed the risks stemming from disclosure of possibly over-optimistic management predictions of company performance as outweighing the benefits to be derived therefrom by investors, given the perceived unreliability of appraisals and projections, their potential for misleading investors, and the lack of sufficient Commission resources to evaluate their reliability in each case. See, *e.g.*, *Union Pac. R.R.* v. *Chicago & N.W. Ry.*, 226 F. Supp. 400, 408-409 (N.D. Ill. 1964) (discussing Commission's traditional approach); see generally L. Loss, *supra*, at 163; SA Rel. No. 5992 (Nov. 7, 1978); 43 Fed. Reg. 53246, 53246-53247 (1978); House Comm. on Interstate and Foreign Commerce, 95th Cong., 1st Sess., *Report of the Advisory Committee on Corporate Disclosure to the SEC* 347-349 (Comm. Print 1977); see also *Flynn* v. *Bass Brothers Enterprises, Inc.*, 744 F.2d at 985-987; *Gerstle* v. *Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1294 (2d Cir. 1973). For example, the Commission long took the

such data.[9] This evolution in Commission policy resulted from empirical findings that such "information is important to an investor's assessment of a

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position, now abandoned, that issuers whose securities were in registration should not make any projections, predictions or estimates with respect to income, earnings, or the value of the securities. SA Rel. No. 5180 (Aug. 16, 1971); 36 Fed. Reg. 16506, 16507 (1971).

[9] Beginning in 1973, the Commission undertook a thorough reexamination of its traditional position disfavoring the dissemination of soft information to investors. See *Gerstle* v. *Gamble-Skogmo, Inc.*, 487 F.2d at 1294; SA Rel. No. 5362 (Feb. 2, 1973); 38 Fed. Reg. 7220 (1973). After publishing a series of rule proposals in 1975 relating to projections of future economic performance, see, *e.g.*, SA Rel. No. 5581 (Apr. 25, 1975); 40 Fed. Reg. 20316 (1975), the Commission announced in 1976 that its long-standing policy may have contravened investors' interest in securing predictive information, and that it therefore would not object to the disclosure in public filings of projections of future economic or corporate performance, so long as they were made in good faith, had a reasonable basis, and were accompanied by information sufficient to permit informed investment decisions. SA Rel. No. 5699 (Apr. 23, 1976); 41 Fed. Reg. 19986 (1976). See *Flynn* v. *Bass Brothers Enterprises, Inc.*, 744 F.2d at 987. Two years later, the Commission issued a statement encouraging voluntary disclosure of management projections, based on the "significance attached to projection information and the prevalence of projections in the corporate and investment community." SA Rel. No. 5992 (Nov. 7, 1978); 43 Fed. Reg. 53246, 53247 (1978). To further its goal of encouraging disclosure of future-oriented information, the Commission adopted a "safe harbor" for issuer statements projecting such "forward-looking" items as income, earnings per share, and other indicia of future economic performance, and describing plans and objectives for future operations. SA Rel. No. 6084 (June 25, 1979); 44 Fed. Reg. 38810 (1979) (codified at 17 C.F.R. 230.175, 240.3b-6). The Commission has even mandated disclosure of appraisals in certain situations. Regulation

corporation's future earning power and may be material to informed investment decisionmaking." *Guides for Disclosure of Projections of Future Economic Performance*, SA Rel. No. 5992 (Nov. 7, 1978); 43 Fed. Reg. 53246, 53247 (1978) (footnote omitted).[10]

However, the disputed asset appraisals here were based principally on the value of Marathon's oil and gas reserves, a type of soft information that has been singled out by the Commission for special regulatory treatment because of factors unique to the oil and gas industry.[11] While the USS tender offer was pend-

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240.13e-3 promulgated in 1979, requires that asset appraisals received by the issuer and material to the transaction be disclosed to shareholders in connection with "going private" mergers. SA Rel. No. 6100 (Aug. 2, 1979); 44 Fed. Reg. 46736 (1979). The Commission in 1980 issued a release reflecting the staff's insistence upon the disclosure of good-faith appraisals made on a reasonable basis in proxy contests where the principal issue is the liquidation of all or a portion of the issuer's assets. SA Rel. No. 16833 (May 23, 1980); 45 Fed. Reg. 36374 (1980).

[10] The Commission's current approach toward disclosure of soft information generally is reflected in a policy statement "encourag[ing] the use * * * [in Commission filings and annual reports to shareholders] of management's projections of future economic performance that have a reasonable basis and are presented in an appropriate format." 17 C.F.R. 229.10(b).

[11] When adopting, in 1978, special rules governing financial accounting and reporting practices for oil and gas-producing activities, including required disclosure of proven reserve appraisals, the Commission emphasized that reporting requirements imposed on oil and gas companies were necessarily industry-specific:

> The Commission's determinations published in this release * * * are unique in many respects. They reflect the requirements of the Energy Policy and Conservation Act of 1979 * * *, which directs the Commission to assure the

ing, as the *Starkman* decision points out (Pet. App. A42-A43; seee pages 6-7, *supra*), Commission Reg. ulation S-K directed that "[e]stimates of oil or gas reserves other than proved * * * *shall not be disclosed* in any document publicly filed with the Commission * * *" (emphasis added).[12] The Commission

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development and observance of accounting practices to be followed in the preparation of accounts by oil and gas producers, as well as characteristics peculiar to the oil and gas industry.

SA Rel. No. 5966 (Aug. 31, 1978); 43 Fed. Reg. 40688, 40689 (1978); see *id.* at 40712-40719 (amending Regulation S-X, 17 C.F.R. Pt. 210).

[12] 17 C.F.R. 229.20, Instruction 4 to Item 2(b) (1981); see SA Rel. No. 6008 (Dec. 19, 1978); 43 Fed. Reg. 60418, 60420 (1978) (codified at 17 C.F.R. 229.20, Instruction 4 to Item 2(b) (1979)). The term "reserves" refers to oil or gas not yet extracted for which there is reason to believe production is feasible. *Sunray DX Oil Co.* v. *Helmerich & Payne, Inc.*, 398 F.2d 447, 450 (10th Cir. 1968). As defined by the Commission, "[p]roved oil and gas reserves are the estimated quantities of crude oil, natural gas, and natural gas liquids which geological and engineering data demonstrate with reasonable certainty to be recoverable in future years from known reservoirs under existing economic and operating conditions, i.e., prices and costs as of the date the estimate is made" (17 C.F.R. 210.4-10(a)(2)). Estimates of the values of "probable," "potential" and "exploratory" reserves are those premised on more cursory geological and engineering data, and therefore are far less reliable than estimates of proven reserves. See *Del Noce* v. *Delyar Corp.*, [1976-1977] Fed. Sec. L. Rep. (CCH) ¶ 95,670, at 90,293 n.6 (S.D.N.Y. July 30, 1976).

The Commission had long espoused the view that "investors unfamiliar with the technical aspects of the oil and gas business—and these would likely include most shareholders of major oil companies * * *—would ignore or misconstrue the technical but extremely significant difference between 'proved' and 'probable' oil reserves." Brief of the Amicus Curiae SEC

later amended Regulation S-K to permit disclosure of estimates of less-than-proven oil and gas reserves where, as here, these estimates were "provided previously to a person * * * that is engaged in an acquisition of the [company] or its equity securities." SA Rel. No. 6383 (Mar. 3, 1982); 47 Fed. Reg. 11380, 11406 (1982) (codified at 17 C.F.R. 229.102, Instruction 5). See 17 C.F.R. 210.4-10(k)(5)-(6). In 1981, however, such disclosure was prohibited.

Section 23(a)(1) of the Securities Exchange Act, 15 U.S.C. 78w(a)(1), provides that the liability sections of the Act do not apply to "any act done or omitted in good faith in conformity with a rule, regulation, or order of the Commission." The Strong and First Boston reports both included, and based their valuations in part on, estimates of less-than-proven reserves. Although there was no finding with respect to good faith, the court of appeals based its decision in *Starkman*, on which it relied in *Radol*, in part on Section 23(a)(1) together with the then-existing prohibition in Regulation S-K (Pet. App. A43.)[13] The de-

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at 5, *Sunray DX Oil Co.* v. *Helmerich & Payne, Inc.*, 398 F.2d 447 (10th Cir. 1968); see SA Rel. No. 6008 (Dec. 19, 1978); 43 Fed. Reg. 60418, 60420 (1978). As one court explained, "estimating probable [or possible or exploratory] reserves involves excessive speculation and guesswork. Recognize experts disagree as to the proper methods to be used." *Del Noce* v. *Delyar Corp.*, [1976-1977] Fed. Sec. L. Rep. at 92,294. See *Sunray DX Oil Co.* v. *Helmerich & Payne, Inc.*, 398 F.2d at 450-451; *Resource Exploration* v. *Yankee Oil & Gas, Inc.*, 566 F. Supp. 54, 62-64 (N.D. Ohio 1983).

[13] Several months before the USS tender offer, as petitioners point out (Pet. 25-29; see Pet. App. A65-A66), the Commission invited public comment on two amendments to Regulation S-K that would have permitted disclosure of unproven reserves, either in general, with appropriate qualification, or when the

cision below, therefore, turns to a substantial extent on a rule applicable only in the past and only to this particular industry.

2. The decision below also appears to rest in significant part on the court of appeals' view of the particular asset appraisals at issue here. The court described them as "based on highly speculative assumptions" (Pet. App. A46; see *id.* at A4-A6, A30-A32), and said that disclosure of the appraisals could well have been misleading without "an accompanying mountain of data and explanations" (*id.* at A46). Accordingly, while the court of appeals' opinions suggest several different approaches to the disclosure question, the court of appeals' decision below may rest so substantially on the court's assessment of the reliability of these particular appraisals, in light of the historical and factual context in which they were made, as to limit sharply the significance of the decision and render it an inappropriate vehicle for examination of the materiality of soft information generally.[14]

3. The "substantial certainty" test announced by the court below may or may not conflict with the test announced by the Third Circuit in *Flynn*, depending on how the two are interpreted in the respective circuits. The Third Circuit's "totality of circumstances"

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omission of these data would have rendered a document materially misleading. SA Rel. No. 6332 (Aug. 12, 1981); 46 Fed. Reg. 41925 (1981). As the Commission explained, the latter amendment simply would have codified staff practice (*id.* at 41930; see Staff Accounting Bulletin No. 47 (Sept. 16, 1982); 47 Fed. Reg. 41727 (1982) (discussing staff practice). The Commission subsequently withdrew both proposed amendments. SA Rel. No. 6383 (Mar. 3, 1982); 47 Fed. Reg. 11380 & n.2 (1982).

[14] We, of course, express no view as to the reliability of the appraisals at issue in this case.

test for required disclosure of soft information has never been applied: in *Flynn*, the Third Circuit determined that federal securities law did not, as of the time of the tender offer at issue (1976), require disclosure of two reports, including an asset appraisal (744 F.2d at 988-991); the court announced its new test prospectively only (*id.* at 988). Until the two circuits have both applied their potentially disparate tests in concrete factual circumstances, any conflict remains, in our view, largely theoretical.[15]

In *Northway*, this Court held that an omitted fact is material when there exists "a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder * * *," or "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available" (426 U.S. at 449 (footnote omitted)).[16] This Court has not yet expressly

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[15] Several factors suggest that any ostensible conflict between the general principles articulated by the two circuits could well prove illusory. The *Starkman* court expressly referred to the disclosure prohibition in Regulation S-K in reaching its decision (Pet. App. A42-A43); the *Flynn* court, on the other hand, was not presented with the oil and gas reserves question, and relied (744 F.2d at 985-988) upon the Commission's general policy of encouraging soft information disclosure. In *Starkman*, moreover, the court of appeals expressly recognized how the Commission's general policy on soft information disclosure has liberalized in recent years (Pet. App. A41; see page 6, *supra*). The Sixth Circuit may take an approach similar to that outlined in *Flynn* and permit a lesser degree of certainty outside the area of oil and gas reserve disclosures.

[16] The Court in *Northway* found these assessments to be "peculiarly ones for the trier of fact," holding that the ques-

considered the application of that standard to soft information.[17] The test articulated by the court below, which would require substantial certainty in the pro-

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tion of materiality must be submitted to the jury unless the omitted information is " 'so obviously important to an investor, that reasonable minds cannot differ on the question' " (426 U.S. at 450, quoting *Johns Hopkins University* v. *Hutton*, 422 F.2d 1124, 1129 (4th Cir. 1970); see *id.* at 450 n.12). Of course, just as information may be "so obviously important" that resort to a jury is not necessary, jury consideration may be unnecessary because the information is "so obviously unimportant."

[17] In *Northway*, 426 U.S. at 454-460, a target corporation had omitted from its proxy statement an investment banking firm's projection of a decline in the market value of securities to be received by shareholders of the target. The Court considered whether this omission was material and rendered misleading a representation in the target's proxy statement that shareholders would receive a substantial premium over market value. The Court declined to rule, as a matter of law, either that the proxy statement misled shareholders or that the information omitted was material, concluding instead that "[t]hese are questions * * * best left to the trier of fact" (*id.* at 460). The Court did not expressly consider how the "softness" of the information might bear on its materiality. Several lower courts, in assessing the materiality of predictive information, have weighed both the magnitude of the future event and the probability of its occurrence. See, *e.g.*, *SEC* v. *MacDonald*, 699 F.2d 47 (1st Cir. 1983); *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968) (en banc), cert. denied, 394 U.S. 976 (1969). See also *Smallwood* v. *Pearl Brewing Co.*, 489 F.2d 579 (5th Cir.), cert. denied, 419 U.S. 873 (1974); *Sonesta Int'l Hotels Corp.* v. *Wellington Associates*, 483 F.2d 247 (2d Cir. 1973). The materiality test proposed by the Third Circuit in *Flynn* appears to require a determination of the reliability of the soft information and a balancing of the relative benefits and risks to investors of disclosure (see 744 F.2d at 988).

jections underlying soft information, may be inconsistent with *Northway*, but because of the circumstances described at pages 9-14, *supra*, that question is not squarely presented in this case.

Finally, we note that two cases raising the general question of the materiality of soft information are now pending before the Fourth and Seventh Circuits.[18] Decisions in these cases may influence future decisions in the Third and Sixth Circuits, and may provide the Court with a better vehicle to resolve the issue should a conflict develop.

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[18] *Walker* v. *Action Industries, Inc.*, CA No. 84-720-A (E.D. Va. Mar. 27, 1985), appeal pending, No. 85-1407 (4th Cir.) (claim that omission of internal sales forecasts rendered tender offer materials misleading); *Dixon* v. *Ladish Co.*, 597 F. Supp. 20 (E.D. Wis. 1984), appeal pending, No. 85-1300 (7th Cir.) (claim that omission of internal asset appraisals rendered proxy materials misleading).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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